No. 89-792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OLYMPIA BREWING COMPANY,

Petitioner,

vs.

LOUIS P. SINGER, As Successor in Interest to Troster, Singer & Co.,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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Proof of 10b-5 fraud requires a detailed, almost surgical application of fact to law, creating liability only when each element of the claim is satisfied. Thus far, Singer has succeeded with a blunderbuss, not a scalpel. In his opposition, Singer paints with the same broad brush that prejudiced Olympia with the jury and persuaded the Courts below to avoid a close and careful inquiry into the absence of any facts to support Olympia's intent to defraud. Instead of undermining the Petition, however, Singer's tactic helps make Olympia's case: If Olympia can be held liable for intent to defraud for a statement (1) made *after* full disclosure to the regulators at the Securities Exchange Commission and (2) which injected truthful information into the market causing Olympia stock to fall (entirely contrary to

Olympia's purported motive to withhold information to keep its stock price high), intervention by this Court is warranted. The range of permissible inferences that can be drawn from otherwise permissible conduct is presently too broad to support the requirement and purpose of the securities acts that intent to defraud be proven. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). This case provides an opportunity for this Court to make the intent requirement meaningful.

Singer's opposition raises two new issues that merit comment:

1. Singer argues that the Court's charge excluded the possibility of inference drawing by the jury. Exactly the opposite is true; the charge went so far as to invite the jury to draw inferences from circumstantial evidence.

2. Singer also contends that there is "ample" *direct* evidence to establish Olympia's intent to defraud. In fact, there is none. Without citation to the record, Singer purposely confuses what Olympia *knew* about Bernhardt's fraud with an intent to deceitfully act on that knowledge when it made its statement to *Barron's*.

I. THE COURT'S CHARGE INVITED THE JURY TO DRAW INFERENCES OF OLYMPIA'S INTENT.

On its face, the passage from the jury charge quoted by Singer (Opp., 16) contradicts the proposition for which he cites it. Inferences form the basis for a finding based on circumstantial evidence, which evidence was clearly available to this jury:

> "The question of whether a person acted with intent to defraud or with reckless disregard is a question of fact for you to determine, like any other fact question. It is a question involving state of mind.

> "Direct proof of state of mind is almost never available. You can't look into someone's brain. Thus, direct proof is not required. Circumstantial evidence, if believed, is of no less value than direct evidence. In either case, it is the plaintiff's burden to prove all of the elements by a preponderance of the evidence." (JA 1121-1122)

Singer's contention that the jury could not infer intent is doubly unbelievable in light of a passage from the charge he chose not to cite:

> "Circumstantial evidence is a little more complicated. Circumstantial evidence is evidence that tends to prove a fact in issue by proof of other facts from which the fact in issue may then be inferred by your logic and reason. . . ." (Examples omitted).
>
> "That's all there is to circumstantial evidence. I proved certain subordinate facts which I then asked you to infer by the exercise of your common sense and your reason. . . ."
>
> "There are times when different inferences may be drawn from a certain fact or set of facts. An inference is a deduction, a conclusion that the jury is permitted to draw but is not required to draw from the facts that have been established by either direct or circumstantial evidence.
>
> "An inference is not to be drawn by guesswork or speculation, but must be arrived at by the exercise of your reason or common sense. So, while you are deliberating you may draw from the facts that you find have been proven whatever reasonable inferences that commend themselves to you in light of your experience, reason and common sense." (JA 1112-1114)

There can be no argument that the jury was permitted — even encouraged — to draw inferences in this case. Singer's

transparent attempt to dispose of this issue by miscitation and misapplication of the law exposes the true significance of this issue.

II. THERE WAS NO EVIDENCE OF INTENT TO DEFRAUD

Singer's entire brief recites "facts" of how much Singer *knew* about Bernhardt's fraud *prior* to the *Barron's* article on March 7, 1977.[1] These facts were disputed by Olympia at trial, its former officers testifying that they were not aware of the full scope of Bernhardt's fraud when Olympia went to the SEC on March 3, 1977. Yet for purposes of this argument, Olympia can concede that it had full knowledge of Bernhardt's fraud prior to March 3. There is still not one shred of evidence that Olympia intended to defraud anyone by not revealing Bernhardt's activities and the ongoing SEC investigation to *Barron's*. There is no evidence of a culpable state of mind or an extreme departure from the standards of ordinary care on the part of Olympia. And, as evidenced by his lack of any citation, there is certainly no direct evidence as Singer contends.

Because there is no direct evidence, Singer has concocted its "theories" of Olympia's nefarious motives from what Olympia maintains is highly ambiguous evidence. Singer has perpetuated a myth it calls Olympia's "acquisition program" in an attempt to make more of an issue than the evidence warrants. For example, the Lone Star deal was signed in August 1976 and approved by the Lone Star shareholders in December 1976. At the time of the alleged misleading omission to *Barron's* in March 1977, the only thing about the deal that had not yet been

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[1] Although Singer's brief cites purportedly misleading press releases and an Olympia letter to shareholders occurring after the stock had tumbled and the SEC had suspended trading (Opp., p. 11), these statements are irrelevant. At trial, Singer's trader, Frederick Rittereiser, unqualifiedly admitted that these events occurred "way too late" to make a material difference to Singer's trading decisions. (JA 210-211) Absent such a casual relationship, there can be no responsibility. Olympia was held liable only for its truthful but allegedly misleading statement to *Barron's*.

completed was the ministerial transfer of some stock certificates by Olympia's transfer agent, Seattle First National Bank. Yet, as a prime example of how ambiguous evidence can be manipulated by inference drawing, Singer unabashedly argues to this Court that Olympia did not disclose Bernhardt's manipulation because the Lone Star exchange had not been completed (Opp., p. 7). In truth, the Lone Star deal had effectively been completed months earlier, and disclosure in March would not have affected the validity of the acquisition.

Likewise with respect to the purported "acquisition program," and contrary to Singer's unsupported statements (*e.g.*, Opp., p. 12), there was not even the slightest attempt by Olympia to acquire any company in 1977 other than the preliminary discussions Olympia had with All Brands. As noted in the Petition, the All Brands discussions had been terminated by Olympia prior to the *Barron's* disclosure.

Hyperbole about an "acquisition program" cannot substitute for evidence of intent to defraud. Yet, because Olympia had spoken to All Brands at all, the Courts below found it was susceptible to an inference that its statements were wrongfully motivated. To condone the presentation of this highly speculative evidence to the jury is wrong and warrants the attention of this Court.

From the day this case began, Singer has deftly avoided even an attempted explanation of how an intentional, fraudulent nondisclosure to *Barron's* can be squared with Olympia's previous full disclosure to the SEC. Nor has Singer been able to explain how squelching an acquisition rumor to *Barron's*, thereby ensuring the price of the stock would fall, is consistent with Singer's theory that Olympia did not disclose Bernhardt's fraud as part of a plan to keep its stock price high. Common sense dictates that neither incongruity can be harmonized, yet Singer persuaded the jury otherwise. This Court's attention should not be so diverted. Since this Court has taken up similar recurring problems before [*Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106

S.Ct. 2505, 91 L.Ed.2d 202 (1986)], it should accept this case to impose a stronger nexus between the degree of proof necessary for securities fraud and logical inferences which may be drawn in order to give meaning to the intent element found in the statutes which govern.

Respectfully submitted,

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